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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149

To: The Commission

BELLSOUTH REPLY

BellSouth Corporation ("BellSouth"), on behalf of its subsidiaries and affiliates, hereby replies to the oppositions and comments submitted in response to petitions for reconsideration of the FCC's *First Report and Order* in CC Docket No. 96-149, FCC 96-489 (released December 24, 1996), *summarized*, 62 Fed. Reg. 2,927 (January 21, 1997) ("*Order*"), *recon. in part*, FCC 97-52 (released February 19, 1997).

I. THE COMMISSION SHOULD REJECT COX'S SUGGESTION THAT BOCS MUST PROVIDE VIDEO PROGRAMMING THROUGH A SEPARATE AFFILIATE, AS ORIGINALLY PROPOSED BY TIME WARNER

In its comments, Cox Communications, Inc. ("Cox") supports the petition for reconsideration/clarification filed by Time Warner Cable ("Time Warner") urging the Commission to clarify that new Section 272, as added by the Telecommunications Act of 1996,[1] requires Bell operating companies ("BOCs") to provide video programming services only through a separate affiliate.[2] As BellSouth demonstrated in its opposition/comments, however, Time Warner's interpretation of

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1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

2 Cox Comments at 1-2.

Section 272, as adopted by Cox, flies in the face of statutory interpretation, legislative history, and previous Commission decisions.[3]

Specifically, Cox and Time Warner claim that the "incidental interLATA" services exemption under Section 272(a)(2)(B)(i) distinguishes between the video programming service and the telecommunications service underlying it.[4] They argue that the transmission component is exempt from the Section 272 separate affiliate requirements as an incidental interLATA service, but the video programming service itself is not.[5] Accordingly, Cox and Time Warner conclude that BOC video programming services should be treated as non-electronic publishing information services under Section 272(a)(2)(C) fully subject to the separate affiliate requirements of Section 272.[6] BellSouth strongly disagrees.

As BellSouth explained in its opposition/comments, video programming is clearly exempted from the interLATA telecommunications services for which Section 272 requires a separate affiliate.[7] Section 272(a)(2)(B)(i) requires a separate affiliate only for the origination of interLATA telecommunications services "other than . . . incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g)."[8] Section 271(g)(1)(A) defines incidental interLATA services as including "the interLATA provision by a *Bell operating company or its affiliate* . . . of audio programming, video programming, or other programming services to subscribers to such

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3 *See* BellSouth Opposition/Comments at 1-4.

4 *See* Cox Comments at 2; Time Warner Petition at 3-4.

5 Cox Comments at 2-3; Time Warner Petition at 3-4.

6 Cox Comments at 3; Time Warner Petition at 4.

7 BellSouth Opposition/Comments at 2.

8 47 U.S.C. § 272(a)(2)(B)(i).

services of such company or affiliate."[9] This language is unambiguous: the provision of video programming services by a BOC falls under the category of incidental interLATA services for which a separate affiliate is *not* required under Section 272. Section 271(g)(1)(A) specifically states that video programming may be provided not only by a BOC affiliate but also by a BOC itself. The terms of the statute explicitly refute the Cox/Time Warner theory, and the Commission must give effect to those terms.[10]

Both Cox and Time Warner rely upon Section 271(h) to support their argument that only the telecommunications service transmission component of video programming is exempted from the Section 272 separate affiliate requirement, but not the video programming service itself.[11] Section 271(h) does not support their argument, however; it refutes it. Section 271(h) states that the definition of incidental interLATA services under Section 271(g) is to be narrowly construed, and that the interLATA services provided under Section 271(g)(1)(A) "are limited to those interLATA transmissions incidental to the provision *by a Bell operating company or its affiliate* of video, audio, and other programming services."[12] Thus, Section 271(h) specifically states that a BOC, not just a BOC affiliate, may provide video programming services, and may provide interLATA transmission services incidental thereto. As BellSouth stated in its opposition/comments, the fact that interLATA services incidental to the provisioning of video service are excluded from Section 272's separate

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9 47 U.S.C. § 271(g)(1)(A) (emphasis added); *see also* § 271(g)(1)(B), (C).

10 *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940) (quoted in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *Caminetti v. United States*, 242 U.S. 470, 490 (1917).

11 Cox Comments at 2 n.5; Time Warner Petition at 3-4.

12 47 U.S.C. § 271(h) (emphasis added).

affiliate requirements demonstrates that BOCs may, with or without an affiliate, provide both video programming and incidental interLATA transmissions.[13]

II. MCI'S ARGUMENTS IN OPPOSITION TO BELLSOUTH'S PETITION FOR RECONSIDERATION SHOULD BE REJECTED

A. The Statute Does Not Require BOCs to Provide Out-of-Region InterLATA Information Services Through a Separate Affiliate

BellSouth demonstrated in its petition for reconsideration that under the statute BOCs are not required to employ a separate affiliate to provide out-of-region interLATA information services.[14] Specifically, Section 272(a)(2)(B) requires a separate affiliate for the "[o]rigination of interLATA telecommunications services," but specifically exempts from that requirement "out-of-region services described in section 271(b)(2)."[15] Under Section 271(b)(2), BOCs — not only their affiliates — were authorized to provide out-of-region interLATA services immediately upon the enactment of the 1996 Act. Because out-of-region interLATA services encompasses out-of-region interLATA *information* services, the provision of such services is exempt from the separate affiliate requirement, pursuant to Sections 271(b)(2) and 272(a)(2)(B)(ii).[16]

Nevertheless, MCI Telecommunications Corporation ("MCI") argues that the provision in Section 272(a)(2)(C) that a separate affiliate is required for "InterLATA information services, other than electronic publishing . . . and alarm monitoring services," trumps any exception for out-of-region interLATA information services contained in Sections 272(a)(2)(B)(ii) and 271(b)(2).[17] Moreover, MCI asserts that Congress would have explicitly included an exception for out-of-region

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13 BellSouth Opposition/Comments at 3.

14 BellSouth Petition at 10-13.

15 47 U.S.C. § 272(a)(2)(B)(ii).

16 *See* BellSouth Petition at 11-13.

17 *See* 47 U.S.C. § 272(a)(2)(C); MCI Opposition at 2-3.

information services in Section 272(a)(2)(C) as it did for electronic publishing and alarm monitoring services if it had intended to exclude out-of-region information services from the separate affiliate requirement, and that its failure to include such an exception in Section 272(a)(2)(C) should be controlling.[18] BellSouth disagrees with this analysis.

The statute clearly exempts out-of-region interLATA information services from the separate affiliate requirement under Section 272(a)(2)(B)(ii), while it subjects other such services to the requirement when provided in-region under Section 272(a)(2)(C). Section 272(a)(2)(B)(ii) provides that all out-of-region services described in Section 271(b)(2) are exempted from the separate affiliate requirement otherwise imposed upon the origination of interLATA telecommunications services. Under Section 271(b)(2), out-of-region services are defined as "interLATA services originating outside [a BOC's] in-region States."[19] As BellSouth demonstrated in its petition, the term "interLATA services" encompasses the provision of "interLATA information services," and thus out-of-region information services are clearly excluded under Section 272(a)(2)(B)(ii). [20]

MCI's argument that Section 272(a)(2)(C) requires a separate affiliate for interLATA information services (other than electronic publishing and alarm monitoring services) despite the exceptions for out-of-region interLATA information services in Sections 272(a)(2)(B)(ii) and 271(b)(2) is not supported by the language of the statute, which does *not* require one section to prevail over another, since the sections can be read consistently.[21] As shown above, Sections 272(a)(2)(B)(ii) and 271(b)(2), which exclude out-of-region interLATA information services, are consistently read with Section 272(a)(2)(C) by applying the separate affiliate requirement in the

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18 *See* MCI Opposition at 3-4.

19 47 U.S.C. § 271(b)(2).

20 BellSouth Petition at 11-13.

21 Accordingly, MCI's citation to *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1171 (9th Cir.), *cert denied*, 444 U.S. 943 (1979), is inapposite. *See* MCI Opposition at 2-3 & n.1.

latter section to in-region interLATA information services. Although Congress certainly could have included an additional exception from the separate affiliate requirement for out-of-region interLATA information services in Section 272(a)(2)(C), there was no reason for it to do so when it already excluded such services under Sections 272(a)(2)(B)(ii) and 271(b)(2). Accordingly, MCI's arguments should be rejected.

B. BOC Affiliates Should Be Permitted to Provide Maintenance and Installation Services for the BOC and the InterLATA (Section 272) Affiliate

Section 272(b)(1) requires that a BOC separate affiliate "shall operate independently" from the BOC itself.[22] The Commission has concluded that this section prohibits both performance by the Section 272 affiliate of operating, installation, and maintenance functions associated with BOC facilities, as well as performance by the BOC or its other affiliates of operating, installation, and maintenance functions associated with facilities that the Section 272 affiliate owns or obtains from a third party.[23] BellSouth has previously stated in this proceeding that it believes the Commission's interpretation of "operate independently" is overly restrictive and should be reconsidered, at a minimum, to permit a BOC *affiliate* (other than the Section 272 long distance affiliate) to perform installation and maintenance functions for both the telephone company and the long distance (interLATA) company.[24]

MCI's argues that BellSouth interprets the phrase "operate independently" in Section 272(b)(1) to have no independent significance apart from the requirements in Section 272(b)(2)-(5).[25] MCI has misunderstood BellSouth's argument in this regard. BellSouth has not advocated

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22 47 U.S.C. § 272(b)(1).

23 *Order* at ¶ 158.

24 *See* BellSouth Petition at 4-7; BellSouth Opposition/Comments at 5-8.

25 *See* MCI Opposition at 5-8.

that this provision be given no meaning, but rather has shown that Section 272(b)(1)'s "operate independently" language is a straightforward requirement analogous to the *Computer II* and cellular rules, and it does not require additional rules or further structural regulation to explain its meaning.[26] MCI points out that the *Computer II* rules relied upon by BellSouth for guidance in this regard required the *Computer II* affiliate to have its own personnel for installation, maintenance, and other functions.[27] What MCI fails to recognize, however, is that Congress included the term "operate independently" from the *Computer II* rules but did *not* similarly include a requirement of separate personnel for installation, maintenance and other functions in Section 272(b). Congress chose which *Computer II* provisions to include in Section 272(b), and which not to include.

MCI has also misunderstood BellSouth's statutory construction argument concerning the doctrine of *expressio unius est exclusio alterius*, which MCI says cannot be applied until Section 272(b)(1) has been interpreted.[28] Again, BellSouth believes this section is clear on its face and requires no interpretation. Nevertheless, BellSouth's argument is that when Congress includes certain items in a list, all other items not listed are intended to be excluded.[29] Thus, because Congress required electronic publishing affiliates and joint ventures to be operated independently under Section 274(b) and then listed additional restrictions on activities — such as installation and maintenance — which are not explicitly restricted in Section 272(b), those activities cannot be barred by the operate independently provision of Section 272(b). In other words, the absence of

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[26] BellSouth Petition at 4; *see* 47 C.F.R. §§ 22.903(b) ("Separate corporations must operate independently in the provision of cellular service."), 64.702(c)(2) ("Each such separate corporation shall operate independently in the furnishing of enhanced services and customer-premises equipment.").

[27] MCI Opposition at 5.

[28] *See id.* at 6.

[29] BellSouth Petition at 5; *see* 2A Norman J. Singer, Statutes and Statutory Construction § 47.23 (5th ed. 1992).

installation and maintenance activities from the listing of specific restrictions in Section 272 indicates that Congress did not intend to restrict those activities in the case of the Section 272 affiliate.

Finally, MCI's argument that allowing another (non-Section 272) affiliate to provide installation and maintenance services would undercut the operate independently requirement is irrelevant,[30] since Section 272(b)(1) addresses only the relationship of the Section 272 affiliate with respect to the BOC, not other affiliated companies. It states: "The separate affiliate . . . shall operate independently from the Bell operating company." It does not in any way purport to govern the relationship of the Section 272 affiliate with *other* affiliated companies. Accordingly, BellSouth agrees with U S West that the operational independence of the Section 272 affiliate as it relates to the BOC is not compromised because the BOC is not providing any service at all.[31]

C. The Definition of "Marketing and Sale of Services" Should Include Product Development and Strategy

BellSouth sought reconsideration of the Commission's decision that activities which "may involve BOC participation in the planning, design, and development of a section 272 affiliate's offerings" regarding product development and strategy were beyond the scope of Section 272(g)'s authorization of "marketing and sale of services," and would thus be subject to Section 272(c)'s nondiscrimination requirements.[32] BellSouth believes that the exclusion of all planning, design and development efforts concerning product development and strategy from the scope of Section 272(g) is overbroad, since such efforts will be required in order to determine the nature and extent of the

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30 *See* MCI Opposition at 8.

31 *See* U S West, Inc. Response at 10 & n. 37.

32 BellSouth Petition at 7-10 (quoting *Order* at ¶ 296).

services that a BOC will sell and market.[33] MCI now claims BellSouth's approach is "standardless" and would provide no basis for distinguishing between exempt marketing and any other activity.[34]

BellSouth believes that BOCs should be allowed to exercise the same marketing freedom as their competitors, and the exclusion of marketing planning, design and development activities would unfairly prevent the BOCs from doing so, contrary to the intent of Congress.[35] Accordingly, the standard MCI claims BellSouth lacks can be found in the concept of parity between the BOCs and the interexchange carriers ("IXCs") espoused by Congress — Congress intended to allow the BOCs the same freedom to develop, design and market local and interLATA products as their competitors have,[36] and thus BOCs should be permitted at a minimum to provide product development and strategy activities as part of the marketing and sale of services to the same extent permitted to an IXC under the statute. Indeed, the Commission has already recognized that after a BOC receives its Section 271 authorization to provide in-region interLATA services, the Section 272(g)(2) restriction against the BOC's marketing and sale of its affiliate's interLATA service is no longer applicable, "and the BOC will be permitted to engage in *the same type of marketing activities as other service providers.*"[37]

MCI also argues that BellSouth does not adequately explain how its approach is consistent with the "operate independently" requirement in Section 272(b)(1).[38] As stated in BellSouth's

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33 BellSouth Petition at 8-9.

34 MCI Opposition at 9.

35 BellSouth Petition at 9-10; *see* S. Rep. No. 23, 104th Cong., 1st Sess. 23, 43 (1995) ("Senate Report").

36 For example, in the marketing provisions of Section 272(g) and 271(e), Congress sought to establish parity among the BOCs and the major IXCs with respect to their ability to offer one-stop shopping. *See* Senate Report at 43.

37 *Order* at ¶ 291 (emphasis added).

38 MCI Opposition at 9.

petition for reconsideration,[39] the language in Section 272(b)(1) requiring a BOC interLATA affiliate to "operate independently" from the BOC does not constitute an invitation to the Commission to engage in structural regulation beyond what Congress has done in the remainder of Section 272(b). Congress has established in Section 272(b)(2)-(5) and in Section 272(g)(1) and (2) the safeguards necessary to ensure competitive activities; hence, its approach is fully consistent with Section 272(b)(1). If Congress had intended to grant the FCC authority to prescribe additional regulations, it would have done so explicitly.

CONCLUSION

For the foregoing reasons, BellSouth urges the Commission adopt the rules and policies expressed herein.

Respectfully submitted,

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[39] *See* BellSouth Petition at 4-7.

CERTIFICATE OF SERVICE

I, Phyllis Martin, hereby certify that copies of the foregoing "BellSouth Reply" to comments and oppositions in response to petitions for reconsideration in CC Docket No. 96-149 were served via U.S. mail on this 16th day of April 1997, to the persons listed below:

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